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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 376

JOHN P. PETERS, Petitioner

v.

OVETA CULP HOBBY, ET AL., Respondents.

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

I.

At the conclusion of the oral argument, the Chief Justice requested counsel to "brief for us the question of whether the [Loyalty Review] Board can review an agency's dismissal of the proceeding against an accused employee." This Brief by Petitioner is addressed to that issue.

We have concluded that this question must be answered in the affirmative. But before addressing ourselves to the reasons for that conclusion, we wish to point out that even if a technical defect in the Board's jurisdiction were to be discovered at this late date, we believe that it is appropriate for the Court to decide the basic constitutional issue of whether the punishment imposed on Dr. Peters is one which must be accompanied by due process.

In oral argument counsel for Petitioner stated that he would prefer not to win the case on the ground that the Loyalty Review Board had no jurisdiction to try and condemn Dr. Peters. Counsel was properly admonished by one of the Justices that his preference for grounds of the decision was not a relevant consideration. What counsel should have said, and what he now says, is that if the case is decided on this technical procedural ground, Dr. Peters will have lost.

It is of no comfort to petitioner that such a decision would leave him free to apply for another government appointment. The Court must realize that having been stigmatized as disloyal he has no chance of such an appointment. Indeed, he has small chance of traveling abroad because the grounds for his conviction of disloyalty are the same grounds which would deny him a passport. He and others like him will not be accepted for employment in defense industries. For the rest of his life he must wear the badge of infamy which the Board has imposed upon him.

Even if the Board were lacking in jurisdiction, the constitutional issues in this case should be decided. Otherwise Dr. Peters will never have had his day in court. He has no action for libel. He has no remedy whatever. His own government has accused him, tried him and condemned him as disloyal to his country. If this Court holds that this procedure does not violate the Constitution, Dr. Peters must face the consequences with resignation. But at least he will have had his day in court. Surely this Court would not seek to deny him that.

The rule so often announced by this Court that constitutional issues will not be decided where there are other grounds for decision is a rule of practice based upon the discretion of this Court. It is supported by many sound reasons. There is the respect which the Court should give to an act of Congress which should be presumed valid unless the Court is compelled to conclude otherwise. There is the danger that the decision may be premature if the issue of constitutionality lies in the periphery rather than in the center of the case. There is the possibility that a case may be manufactured for the purpose of obtaining a constitutional ruling.

But this case is not affected by any of these considerations. No act of Congress is involved. Certainly a decision on this issue nine years after the loyalty program was initiated and four years after this Court divided four to four in Bailey v. Richardson, 341 U.S. 918, cannot be premature. Nor can it be suggested that Dr. Peters invited this trial and obtained this badge of infamy in order to bring a test case.

We are asking this Court to remove this badge of infamy by holding that the Board could not and did not exercise an independent judgment based on evidence which it could evaluate. We are asking it to hold that Dr. Peters had no opportunity to defend himself because he could not know or cross-examine his accusers. If that issue is not decided, Dr. Peters will remain branded before his profession as a person convicted by his peers, as one to be shunned and avoided because he has been disloyal to his country. It

will do him no good to have this Court say that he was convicted by the wrong tribunal, if it does not remove the stain of the conviction.

Failure to decide the real issue in this case puts the Government of the United States under a cloud. If the Government is sincere, and we are sure it is, it must carry on the loyalty and security program until the cold war is over. We urge this Court consider the injustice in the event that the Court at some later day holds that these hearings lack due process to those who are convicted in the interim. Their salaries will have been forfeited; their careers ruined. It will be small comfort to them or to their surviving children to learn years later that it was all a ghastly mistake.

We say that the Bill of Rights was meant to be a living part of our Constitution, capable of affording effective relief to those injured by its violation. A decision of this Court which does not face the issue of constitutionality would put the Fifth Amendment so far back on the shelf that most of the injured persons can never reach it. The story of Beatrice Murphy Campbell which we have filed as an Appendix to our Brief shows that the penalty of suspension from employment and preparation for one of these character trials is worse than conviction for the ordinary offense. There are 150 boards now sitting on these cases. If their procedures are lawful and necessary, they should be approved. But if they are unlawful, countless victims should not be forced to undergo unnecessary disaster. And the millions of Government employees whose freedom of speech and association are threatened and whose morale is impaired by the

hazard of conviction by a process which we charge is in violation of the Constitution are entitled to have this issue settled.

In the second restrictive covenant case, this Court held that it was proper to decide a constitutional issue even though the parties before the Court were not within the class whose constitutional rights were infringed. Barrows v. Jackson, 346 U.S. 249. The Court recognized (346 U.S. at 257) that it was "faced with a unique situation *** which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." The Court accordingly concluded (Ibid) that "under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."

If judicial sanction by default is given in this case, these injustices must go on. To decline to consider the issue of constitutionality in this case is to change the salutory discretion of the Court to decline to decide constitutional issues into a hard and fast rule that constitutional issues should be avoided, because it is a good thing, in the abstract, to avoid them.

But even if the hard and fast rule were adopted, we still do not believe that this Court could escape a decision on the issue whether or not the conviction of Dr. Peters is a punishment in the eyes of the law. This is shown by a colloquy between the Chief Justice and the Assistant Attorney General which reads as follows (Tr. 62):

"Mr. Burger: I can hardly think of any agency where they accomplished dismissal on one of these derogatory grounds and reemployed the man within three years, or any of the other agencies of the Government employing him, depending, of course, on what the derogatory grounds amounted to.

"The Chief Justice: We have had instances recently where one department released a man because he was a security risk and another department of the Government hired him the next day.

"Mr. Burger: Not under this kind of proceeding at all, Your Honor.

"The Chief Justice: What kind of proceeding? You said that you cannot conceive of their ever re-employing him.

"Mr. Burger: Because there has been no determination in the case that you are referring to. There was a dismissal within an arbitrary authority to dismiss. There was no hearing; no process had been gone through at all."

The quoted colloquy establishes clearly that in the present case a punishment is applied. Where, however, a person is dismissed even on security grounds under arbitrary authority and without a supposed hearing, other Government officials are free to disagree with the conclusion, to hire the person, and to rehabilitate his reputation, as in the Wolf Ladejinsky case. But, as the Assistant Attorney General pointed out, no Government official dares to contradict or disagree with the finding of a Board after "hearing", after "process". Accordingly, the badge of infamy placed by these hearings is a permanent stain, and it makes no difference whether or not it is formally accompanied by a recital of disbarment from Government employment for years or for life. This is the vice of the findings without a true hearing. This is a vice which will not be erased on merely technical grounds.

It is thus made clear that this determination of guilt by the Board is in a different category from ordinary

dismissal even on security grounds. The Government has given Dr. Peters an unfavorable status as a result of his trial and conviction which it asserts it intends to maintain. If the imposition of this status be a punishment, this Court cannot say that its continuation can be permitted simply because, by an alleged misconstruction of its own order, it was imposed by the wrong tribunal. If Dr. Peters were in jail, a reversal on technical grounds would let him out. That is not true in this case. A reversal on technical grounds here results in the continuation of the punishment. The Court is, therefore, faced squarely with the constitutional issue of whether this is in fact the kind of punishment which may be inflicted without due process of law.

II

A) Stated precisely, the question which the Court has asked counsel to brief is whether Regulation 14 of the Loyalty Review Board, as amended, was authorized by E. O. 9835, as amended, and as superseded by E. O. 10450. An answer to this question requires a brief summary of the text and sequence of the applicable orders and regulations. These are set out below.

Executive Order 9835 (12 F.R. 1935) which established the Loyalty Program in March 1947, authorized the Loyalty Review Board (Part III, Section 1, Subsection a)

> "to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned."

The Board was empowered to

> "make rules and regulations, not inconsistent with the provisions of this Order, deemed necessary to implement statutes and executive orders relating to employee loyalty."

Standing alone, these provisions would not necessarily have authorized the Board to review an agency determination which did not involve a recommendation for dismissal.

But Executive Order 9835 further provided (Part III, Section 1, Subsection c, Para. 1) that the Loyalty Review Board should "advise all departments and agencies on all problems relating to employee loyalty". The Board was further directed to "coordinate the employee loyalty policies and procedures of the several departments and agencies."

From the outset the Loyalty Review Board asserted jurisdiction to post-audit agency decisions favorable to the employee. It concluded, in short, that the power to "advise" and to "coordinate" comprehended the authority to review "any" departmental decision involving loyalty. Paragraph 14 of the original "Regulations for the Operations of the Loyalty Review Board", approved and adopted by the Board on December 17, 1947, provided as follows:

> "The Board shall, as it deems necessary from time to time, post-audit the files on loyalty cases decided by the employing Department or Agency or by the Regional Loyalty Board.
>
> "The Board shall have the right, in its discretion, to review on its own motion any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board or any head of employing Department or Agency, even though no appeal has been taken."

On October 4, 1948, Regulation 14 was revised by the Board (Civil Service Comm. Mem. No. 21) as follows (5 C.F.R., Sec. 210.14 [1949]):

> "Post-audit and review of files.
> (a) The Board, or an executive committee of the Board shall, as deemed necessary from time to time, cause post-audits to be made of the files on loyalty cases decided by the employing department or agency, or by a regional loyalty board.
>
> "(b) The Board, or an executive committee of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any department or agency loyalty board or regional loyalty board, or by any head of an employing department or agency, even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case to the head of the agency concerned for hearing, with appropriate instructions or for such further action or procedure as the panel may determine. In exceptional cases, if in the judgment of the Board or of an executive committee of the Board, public interest requires it, the panel may hold a new hearing in the case and after such hearing, affirm or reverse the determination or decision."
> (emphasis supplied)

During oral argument, it was suggested that the phrase "even though no appeal is taken" in the foregoing regulation would be pointless if review of all decisions, including those favorable to employees, were intended (Tr. 34). But Regulation 14, as amended, was a regulation promulgated by the Loyalty Board itself. And since it was construed by the very Board which issued it to authorize post-audit reviews of department decisions favorable to the employee, a contrary construction is precluded. The phrase "even though no appeal is taken" should thus be read as emphasising rather than as limiting the plenary scope of the Board's jurisdiction.

A 1949 directive reflected the Loyalty Review Board's view that it was empowered to review an agency decision favorable to the employee. The various departmental loyalty boards were instructed (Civil Service Com. Mem. No. 35, Feb. 1, 1949) to warn employees cleared by the department that

> "The decision of this [departmental] board is subject to post-audit by the Loyalty Review Board on the record transmitted, with respect to matters of procedure and also to the right of the Loyalty Review Board to institute a review of the case on the merits." 1/

The post-audit was thus utilized by the Loyalty Review Board to coordirate and to preserve uniformity in loyalty matters among the various federal agencies. It was by this instrument that the Board superintended departmental boards whom it deemed unduly lax in loyalty matters. Bontecou, The Federal Loyalty-Security Program 56 (1953). As Miss Bontecou explains (Id. at p. 55):

> "The postaudit was in the beginning simply a device for obtaining an over-all view of the operations of the lower boards and checking on their procedures. It has developed into one of the most important means for imposing substantive as well as procedural standards."

On April 28, 1951, E. O. 9835 was amended by President Truman. E. O. 10241. The standard for refusal of employment or removal in Part V of E. O. 9835 was amended. But Part III of E. O. 9835, which defined the jurisdiction of the Loyalty Review Board, and which the Board had construed as authorizing post-audit reviews, was not altered by the President.

1/ "If the judgment of the lower board is favorable after the hearing, the employee may be so informed, with a warning that this decision is not final until the case has been post-audited and approved by the Review Board." Bontecou, The Federal Loyalty Security Program 58 (1953).

The Loyalty Review Board notified Dr. Peters on April 6, 1953, that it intended to conduct a post-audit (R. 6), and Petitioner was advised on May 22, 1953, that the Board had concluded that there was a reasonable doubt as to his loyalty to the Government of the United States (R. 8). On May 27, 1953, Executive Order 9835, as amended, was revoked and superseded by President Eisenhower. Executive Order No. 10450, 18 F.R. 2489, 5 U.S.C.A. § 631, note. The Loyalty Review Board was thereby abolished. Section 11 of E. O. 10450 expressly recognized that the Loyalty Review Board had asserted jurisdiction to post-audit decisions favorable to the employees concerned. It provided that

> "Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date [i.e., the effective date of E.O. 10450, May 27, 1953] shall be acted upon by such Board ***."

Section 11 on its face distinguished "agency determinations favorable to the employee" from "appeals pending before the Loyalty Review Board." It thus explicitly recognized that the Board was exercising jurisdiction over both cases where the Department had recommended dismissal and cases where it had not done so.

Section 12 of E. O. 10450 provided that the Loyalty Review Board should continue to "exist and function for a period of one hundred and twenty days from the effective date of this Order" to act upon the cases pending under Section 11. In other words, the President expressly recognized that the Loyalty Review Board was exercising jurisdiction over "agency determinations favorable to the officer or employee concerned" and he directed the Board to continue to process such cases.

B) In determining the validity of an administrative regulation, its origin, operation and acceptance by the President are factors of controlling importance. While we acknowledge that under part of the language of Executive Order 9835 the authority for Regulation 14 is not free from doubt, we are convinced that these other factors, outlined above, establish its validity.

First. Regulation 14 was adopted contemporaneously with Executive Order 9835 and was thereafter followed continuously and consistently for a substantial period of time. This Court has held that administrative interpretations are entitled to great weight

> ". . . where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress." United States v. American Trucking Ass'ns., 310 U.S. 534, 549.

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, contains a similar statement:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute. . ."

See also United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84.

This Court has held that judicial alteration of a settled administrative interpretation is particularly undesirable where citizens have "acted in reliance" on the administrative construction of a statute. United States v. Chicago, N.S. &

M.R. Co., 288 U.S. 1, 14. This consideration is most appropriate here, where both the Government and its employees have relied over a long period of time, in matters of the most vital importance, on the validity of Regulation 14.

The reasons why courts should not overturn administrative interpretations such as Regulation 14 have been cogently stated by Dean Erwin N. Griswold in an article dealing with tax regulations:

> "The importance of the contemporaneousness of the regulation as an element in making a workable administrative scheme is readily apparent . . . . In the first place, unless the language of the statute is very general, the primary problem is to ascertain the meaning of the statute as of the time it was enacted. Regulations issued substantially contemporaneously with a statute are the expression of what the statute was understood to mean by those immediately charged with carrying it into effect. Moreover, contemporaneous regulations often express the general understanding of the times, and the actual understanding of men who played an important part in the drafting of the statute . . . .
>
> "Another reason why contemporaneousness is an important factor is its bearing on the need for certainty and predictability in our tax laws. This is where the notion of the Court's function in the scheme of judicial tax administration becomes important. A statute is enacted. A regulation is issued. It will, in the normal course of events, be five or six years, and very likely more, before the construction of the statute, in the light of the regulation, will come before the Supreme Court. In the meantime, people will go on living, and transactions will be conducted under the statute, perhaps all the transactions that are ever going to be conducted under the statute. Thus, it seems that a strong argument can be made in favor of giving very heavy weight to a contemporaneous regulation, so that taxpayers may rely upon it and have some certainty that it will be followed by the courts . . . .
>
> "The Supreme Court's construction of the statute many years after the event, may be abstractly a better or sounder construction than the administrative construction of the Treasury; but it makes bad law if it upsets the reasonable expectations of taxpayers and, it may fairly be said, of the Treasury. The Supreme Court sometimes seems unaware of the serious effect of the time lag in its decisions. The very fact that the Court decision comes years after the event is a strong argument for upholding the contemporaneous administrative construction of the statute, when, as

> will usually be the case, it is within the bounds of reason." Griswold, A Summary of the Regulations Problem, 54 Harvard L. Rev. 398, 405-407 (1941)

We believe that Dean Griswold's reasoning applies with special force to the case at bar. This Court should not hold void a perfectly reasonable practice followed and relied on for years merely to attain what might be thought "abstractly a better or sounder construction" of an order no longer in existence.

Second. Even if the factors discussed above were not entitled to weight, Regulation 14 must be upheld because it is apparent that the President was fully cognizant of it and ratified it. As this Court said with reference to the validity of an immigration regulation under a section of a statute:

> "The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor." Costanzo v. Tillinghast, 287 U.S. 341, 345.

To the same effect is Apex Hosiery Co. v. Leader, 310 U.S. 469, 488:

> "The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute to labor unions has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute."

Ratification may take place either with or without reenactment of the statute or order in question. Reenactment or amendment, of course, makes the case for ratification stronger. See, for example, Hassett v. Welch, 303 U.S. 303, 312:

> ". . . the re-enactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it re-enacted."

Courts attach the same significance to amendment. In National Labor Relations Board v. John S. Barnes Corp., 178 F. 2d 156 (C.A. 7, 1949), involving authority to delegate power to issue subpoenas, the court noted that Congress was well aware that the Labor Board openly and consistently construed the Labor Act as authorizing the delegation of the power to issue subpoenas. Since Congress had amended the subpoena provision of the Labor Act in other respects, the court concluded that:

> "If Congress had not agreed with the Board's construction and the procedure being followed, the subpoena provisions could have been further amended to expressly prohibit the delegation of the subpoena power by the Board. Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when amending Section 11(1), must be considered as legislative ratification of the Board's construction and procedure." 178 F. 2d at 161.

But ratification of an administrative interpretation may be found without either reenactment or amendment of the governing statute or Executive Order. Thus, in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313, this Court declared that "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." The Court observed further:

> "The administrative practice developed before the act of 1922 has thus been continued and confirmed with the tacit approval of the President and the acquiescence of the Congress." 288 U.S. at 314-315.

Cf. Helvering v. Winmill, 305 U.S. 79, 83:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

The validity of Regulation 14 does not depend on tacit approval, however. At least two facts furnish positive evidence of ratification by the President. First, Executive Order 10450 expressly recognized that the Review Board was exercising jurisdiction under Regulation 14 over cases where the Department had not recommended dismissal on loyalty grounds. This demonstrates presidential knowledge of the Board's interpretation. Second, in 1951 Executive Order 9835 was amended in a respect not material here. To paraphrase National Labor Relations Board v. John S. Barnes Corp., supra, if the President, knowing of Regulation 14, had not approved it, he could have further amended Executive Order 9835 to bar post-audit reviews.

The doctrine of ratification, developed with respect to interpretation of acts of Congress by the executive department, applies a fortiorari to interpretation of presidential orders by subordinates. In the former situation the interpretation is by an independent branch of the Government, in no way controlled by the other branch and possibly dominated by the opposite political party. An executive order, on the other hand, is interpreted by persons or agencies appointed by the President and subject to control and/or removal by him. There is, therefore, far more reason to expect such an interpretation to be in harmony with the governing order than is true of interpretation of acts of Congress. Moreover, it is far more likely that the President has actual knowledge of a given administrative interpretation than that the Congress has such knowledge. In addition, since executive orders are easier to change than acts of Congress, the failure of the President to change an order is more convincing evidence of ratification than the failure of Congress to change a statute.

In the present case it is inconceivable that post-audit reviews, an administrative interpretation of the greatest significance to the major executive agencies, could have continued for so long had the chief executive not [redacted] authorized them. For the Court to hold in retrospect that the controversial and widely publicized practice of post-audit reviews was carried on from December, 1947 to the middle of 1953 without presidential acquiescence would be utterly unrealistic. A decision based on such a fiction would be particularly unfortunate in this case where the effect of past post-audit reviews both on the security of the nation and on the future lives of the Government employees involved can never be eradicated by the action of any court.

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